United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

826

Brief for Appellant

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,861

UNITED STATES OF AMERICA,

Appellee

v.

CLAUDE JAMES,

Appellant

Forma Pauperis Appeal from a Judgment of the United States District Court for the District of Columbia.

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TABLE OF CASES, STATUTES AND OTHER AUTHORITIES CITED

(Those cases principally relied upon are marked by an asterisk.)

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in initially sentencing Appellant to be imprisoned without full consideration of whether Appellant was eligible for disposition under the provisions of the Narcotic Addict Rehabilitation Act of 1966.

2. Whether the District Court perpetuated its original error in summarily denying Appellant's motion for modification of sentence under Rule 35, Fed. R. Crim. P by making findings on the factual issues involved without notice to Appellant, without hearing and without due and proper consideration of all known factors.

This case has not previously been before this Court.

REFERENCE TO RULINGS

The attention of the Court is directed to the sole, albeit brief, record in the District Court:

1. Transcript of Hearing (3 pages), March 12, 1969 before Hon. Edward M. Curran, Chief Judge.

2. Transcript of Hearing (2 pages), May 9, 1969 before Hon. Oliver Gasch, Judge.

3. Order by the Honorable Oliver Gasch denying motion for correction or reduction of sentence, filed November 17, 1969.

4. Memorandum to the Honorable Oliver Gasch from Mr. George W. Howard, Chief U.S. Probation Officer.

Brief for Appellant

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Forma Pauperis Appeal from a Judgment of the United States District Court for the District of Columbia

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STATEMENT OF THE CASE

This appeal is taken by Appellant, Claude James, from an order of the United States District Court for the District of Columbia, filed November 17, 1969, denying Appellant's pro se motion for a reduction in sentence or alternatively to be committed pursuant to provisions of the

Narcotic Addict Rehabilitation Act, 18 U.S.C. §§4251-4255, in lieu of serving his present sentence of two to six years for violating 26 U.S.C. §4704(a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1291.

STATEMENT OF FACTS

Chronology

Appellant was arrested October 16, 1968, in the City of Washington, District of Columbia by officers of the Metropolitan Police Department pursuant to a warrant issued October 9, 1968. Appellant was committed to the D.C. Jail.

On November 19, 1968, the Grand Jury indicted Appellant on twelve counts. Four counts charged him with having "purchased, sold, dispensed, and distributed, not in the original stamped package and not from the original stamped package, [narcotic drugs]. . . " on four separate occasions in violation of 26 U.S.C. §4704(a). Four counts asserted that Appellant on four separate occasions did "sell, barter, exchange and give away to [an undercover agent narcotic drugs] . . . not in pursuance of a written order. . ." in violation of 26 U.S.C. §4705(a). The remaining four counts charged that Appellant "facilitated the concealment and sale of [narcotic drugs] . . . after said heroin hydrochloride

had been imported into the United States contrary to law, with the knowledge of [Appellant] . . . " contrary to prohibitions of 21 U.S.C. §174.

On December 20, 1968, Appellant appeared with court appointed counsel, Theodore A. Brown, before Chief Judge Edward M. Curran and entered a plea of not guilty to the charges contained in the indictment. He was remanded to the D.C. Jail.

On March 12, 1969, Appellant again appeared in court with counsel before Chief Judge Curran and with leave of Court withdrew his earlier plea of not guilty and pleaded guilty to two counts of sales of narcotics not in the original stamped package in violation of 26 U.S.C. §4704(a). Appellant was remanded to the D.C. Jail.

On May 9, 1969, Appellant appeared with counsel before Judge Oliver Gasch for sentencing. Judge Gasch summarily sentenced Appellant to not less than two (2) years nor more than six (6) years on each of the two counts, said sentence to run concurrently. The Government, following sentencing, moved to dismiss the remaining ten counts in the indictment, and Judge Gasch granted such motion. Appellant was remanded to the D.C. Jail and later transferred to facilities at Lorton, Virginia.

Appellant subsequently, in an undated letter, wrote Judge Gasch asking the Judge to "grant me a time cut, or place me somewhere I will receive treatment for narcotic addiction. Record at Narcotic Rehabilitation Center at 1825 13th St., N.W. will show that I went there for treatment under the supervision of Mr. Jenkin."

Mr. George W. Howard, Chief U.S. Probation Officer submitted a Memorandum to the Honorable Oliver Gasch under date of November 7, 1969 in apparent response to the Judge's request that the Probation Office review Appellant's letter. Regarding the matter of Appellant's sentence, Mr. Howard opined, "I have reviewed the presentence report, and I feel that Your Honor's sentence was a very fair one. In my opinion, there is no reason to change it." He continued "I believe it should be left up to prison authorities as to when [Appellant] might be placed in a community treatment center."

In an Order filed November 17, 1969, Judge Gasch denied Appellant's motion. The Order was predicated upon two factors: consideration of Appellant's pro se motion and "a memorandum from the Chief U.S. Probation Officer of the District Court indicating that [Appellant] is not an addict."

Appellant filed notice of Appeal to the United States Court of Appeals from the Order filed by Judge Gasch on

November 17, 1969. Judge Gasch ordered consideration of appointment of counsel for Appellant under date of January 8, 1970. By order filed July 2, 1970 the undersigned attorney was appointed to represent Appellant herein.

District Court Proceedings

Appellant, by virtue of his changed plea to guilty on two of the twelve counts charged in the indictment and the dismissal of the remaining ten counts thereof, was not tried. Certain appearances were made before the District Court and transcripts of such hearings were made. These are summarized below.

Hearing - March 12, 1969: A three page transcript exists ("Tr.A"), and shows that Chief Judge Curran directed the Deputy Clerk of Court to propound to Appellant the "standard" questions to Appellant (Tr.A, p.2). Appellant answered directly to each question asked of him. No inquiry, other than the standard questions were made of Appellant or his counsel.

Hearing - May 9, 1969: A two page transcript of the sentencing hearing was prepared ("Tr.B"). Before imposing sentence the Court permitted Appellant's counsel to make a statement on behalf of the Appellant. Counsel told the Court

that Appellant was only selling "for the purpose of getting narcotics. In other words, he was not engaged in the sale as such. I ask Your Honor to be as lenient as possible under the circumstances."

The Court then asked the Appellant if he would care to add to what his counsel had said. Appellant said "like he said, I wasn't selling drugs. I thought I was going to do a favor by getting it for him. Since I am to do some time can I get it under the Narcotic Act?" (Tr.B,p.2).

Judge Gasch immediately pronounced sentence (Tr.B, p.2) and then asked, "Are you presently in jail serving time on another sentence?" (Tr.B, p.2). Appellant replied, "That sentence is over with." (Tr.B, p.2).

No hearing was held by Judge Gasch in connection with the order to which this appeal is directed.

STATUTES INVOLVED

Title 18, United States Code, Section 4251 provides, in pertinent part:

> As used in this chapter -
>
> (a) "Addict" means any individual who habitually uses any narcotic drug as defined by section 4731 of the Internal Revenue Code of 1954, as amended, so as to endanger the public morals, health, safety, or welfare, or who is or has been so far addicted to the use of such narcotic drugs as to have lost the power of self-control with reference to his addiction.
>
> * * *
>
> (c) "Treatment" includes confinement and treatment in an institution and under supervised aftercare in the community and includes, but is not limited to, medical, educational, social, psychological, and vocational services, corrective and preventive guidance and training, and other rehabilitative services designed to protect the public and benefit the addict by correcting his antisocial tendencies and ending his dependence on addicting drugs and his susceptibility to addiction.
>
> * * *
>
> (f) "Eligible offender" means any individual who is convicted of an offense against the United States, but does not include -

* * *

(2) an offender who is convicted of unlawfully importing or selling or conspiring to import or sell a narcotic drug, unless the court determines that such sale was for the primary purpose of enabling the offender to obtain a narcotic drug which he requires for his personal use because of his addiction to such drug.

Title 18, United States Code, Section 4252 provides:

If the court belives that an eligible offender is an addict, it may place him in the custody of the Attorney General for an examination to determine whether he is an addict and is likely to be rehabilitated through treatment. The Attorney General shall report to the court within thirty days; or any additional period granted by the court, the results of such examination and make any recommendations he deems desirable. An offender shall receive full credit toward the service of his sentence for any time spent in custody for an examination.

Title 18, United States Code, Federal Rules of Criminal Procedure, in pertinent part, provides:

Rule 35. Correction or Reduction of Sentence

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate

> issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

Title 42, United States Code, Section 3401 provides:

> It is the policy of the Congress that certain persons charged with or convicted of violating Federal criminal laws, who are determined to be addicted to narcotic drugs, and likely to be rehabilitated through treatment, should, in lieu of prosecution or sentencing, be civially committed for confinement and treatment designed to effect their restoration to health, and return to society as useful members.
>
> It is further policy of the Congress that certain perons addicted to narcotic drugs who are not charged with the commission of any offense should be afforded the opportunity, through civil commitment, for treatment, in order that they may be rehabilitated and returned to society as useful members and in order that society may be protected more effectively from crime and delinquency which result from narcotic addition.

ARGUMENT I

APPELLANT'S LETTER TO JUDGE OLIVER GASCH IS, AND SHOULD HAVE BEEN TREATED AS, A TIMELY MOTION TO CORRECT SENTENCE.

It is submitted that Appellant's pro se motion in form of a letter to Judge Gasch is properly to be considered as a motion filed pursuant to Rule 35, 18 U.S.C. Fed. R. Crim. P. 35, with its purpose to allow the Court to correct an illegal sentence. Petro v. United States, 368 F.2d 807 (6th Cir. 1966). Appellant's motion was timely as Rule 35 permits a court to correct an illegal sentence at any time. The "narrow function" of this portion of the Rule "is to permit correction at any time of an illegal sentence, not to reexamine errors occurring at the trial or other proceedings prior to the imposition of sentence. (emphasis in original) Hill v. United States, 368 U.S. 424, 430 (1962), rehearing denied, 369 U.S. 808 (1962).

ARGUMENT II

DISTRICT COURT ERRED IN SENTENCING APPELLANT WITHOUT DUE AND PROPER CONSIDERATION OF WHETHER HE WAS ELIGIBLE FOR TREATMENT UNDER THE NARCOTIC ADDICT REHABILITATION ACT.

At the time Appellant appeared before Judge Gasch for sentencing on May 9, 1969, a limited record had been created, consisting only of the indictment of the Grand Jury and the presentence report prepared by the Probation Office.

The indictment is clearly an inapposite document upon which to measure whether a defendant is a narcotics addict in view of the fact that use of narcotics is not a crime. Nevertheless, because Appellant had been charged by the Grand Jury with twelve counts involving the possession and sale of narcotic drugs -- in four separate instances during the period September 11, 1968 and September 30, 1968 -- the Court should have been mindful of the potential eligibility of the Appellant for treatment as an addict. As this Court observed in rehearing En Banc in Watson v. United States, No. 21,186 (D.C. Cir. July 15, 1970) at p. 19, "of course it is true that, as a practical matter, no addict can possess narcotics without buying, receiving, or concealing them --

acts which, as was stated by one judge of the division, are 'realistically inseparable from the status of addiction.'"

It must be presumed that the presentence report also provided the Court insight in advance of the sentencing hearing of Appellant's prior involvement with narcotic drugs. For example, at 9:50 p.m. on September 30, 1968, police records indicate that Appellant was arrested by Officer G.D. Lindsay of the 13th Precinct, Metropolitan Police Department, and charged with the possession of narcotics in violation of the Harrison Act. This evidence should certainly have been taken into consideration in the preparation of the report.

At the sentencing hearing held May 9, 1969, Appellant's counsel specifically noted to the Court Appellant's personal involvement with narcotic drugs stating "they are only sales for the purpose of getting narcotics. In other words, he was not engaged in the sale as such." (Tr.B, p.2).

The Court's response was "All right." (Tr.B, p.2).

The Appellant, when provided with the opportunity to add to what counsel had said, specifically asked the Court to consider his problem with the words, "Well, since I am going to get some time, can I get it under the Narcotic Act of the Court?" (Tr.B, p.2).

The Court's answer to Appellant's plea for treatment was the immediate pronouncement of sentence.

It is submitted that the Court erred in not properly making a determination of whether Appellant was eligible -- or even possibly eligible -- for treatment as a narcotic addict.

The law does not require than an instantaneous evaluation be made by the Court of whether a defendant is an addict. In fact, 18 U.S.C. §4252 offers the Court broad latitude in providing that it "may" place an eligible offender in custody for examination to determine whether he is an addict. The choice of the word "may" instead of the word "shall" clearly indicates an intention by the Congress to confer upon District Court judges reasonable discretion whether to commit a defendant for an examination.

Further, the examination process offers both the Court and a defendant assurances that proper evaluation can be made of whether treatment rather than incarceration is the preferable disposition that should be made of the case.

In a recent case involving the application of the Narcotic Addict Rehabilitation Act to, and its place in, the sentencing process, the Fourth Circuit held "that the district judge is responsible for exercising his sound discretion as to

treatment or imprisonment, under the Narcotic Addict Rehabilitation Act, of those eligible defendants who come before him. The failure to exercise discretion is error which may be corrected by remand for resentencing. "United States v. Williams, 407 F.2d 940, 945 (4th Cir. 1966)."

It is submitted that the Court erred in sentencing Appellant without any overt consideration of whether Appellant should be treated under the Narcotic Addict Rehabilitation Act. The failure to even consider such action in light of the then existing record and Appellant's plea for such consideration renders the sentence illegal.

ARGUMENT III

DISTRICT COURT ERRED IN SUMMARILY DENYING APPELLANT'S MOTION FOR CORRECTION OF SENTENCE UNDER RULE 35.

It is submitted the Court, in considering Appellant's motion submitted in the form of a letter to Judge Oliver Gasch, perpetuated the error committed at sentencing by the following specific actions: (A) the Court did not consider evidence provided by Appellant; (B) the memorandum prepared by the Chief U.S. Probation Officer was inconclusive as to the issues presented for consideration; (C) the factual issue before the

Court was in dispute and Appellant was entitled to notice of, and to be present at a formal hearing; and (D) the Court did not fully avail itself of resources available to it for determination of the status of Appellant as a narcotic addict.

A. The Court erred in failing to consider specific evidence provided by Appellant in his Rule 35 motion.

Appellant's letter to the Court setting forth his motion made reference to his narcotic addiction and specifically advised the Court that "Record at Narcotic Rehabilitation Center 1825 13th St., N.W. will show that I went there for treatment under the supervision of Mr. Jenkin." Appellant was attempting to introduce evidence of his narcotic addiction in support of his motion for treatment. The Court, however, made no attempt to verify or check into Appellant's prior history of narcotics use or addiction. The records at the Drug Addiction and Rehabilitation Center of the D.C. Department of Public Health, the agency to which the Appellant referred in his motion, indicates Appellant had indeed been there for treatment and that he had an addiction problem for over two years prior to his arrest on October 16, 1968. The same records also indicate that no contact, by telephone or letter, was made by the Court to ascertain the existence or content of the records. Although the Court in the order from which

this appeal is taken begins with the words "Upon consideration of [Appellant's] pro se motion . . .", serious question is raised as to whether Appellant's plea for treatment was, in fact, properly considered by the Court.

It is submitted that the Court erred in its failure to make even the most superficial examination of Appellant's plea, and that by virtue thereof, Appellant's motion was not properly considered.

B. The memorandum prepared by the Chief U.S. Probation Officer is ambiguous and does not properly address itself to the issue of Appellant's addiction; reliance by the Court upon inconclusive evidence constitutes error.

The memorandum prepared by the Chief U.S. Probation Officer of the District Court in response to the allegations made by Appellant in his motion by its content indicates that the Officer and his staff did nothing more than review the presentence report and record in the case, coming to the conclusion that the "sentence was a very fair one" and that "In my opinion, there is no reason to change it." From this memorandum, Judge Gasch concluded in his order of November 17, 1969 that the "[Appellant] is not an addict."

It is submitted that the memorandum does not support such a finding. In fact, the contrary is shown. Mr. Howard states in the third sentence of the third paragraph "[Appellant's] difficulties with the law antedate his addiction by some years . . ." (emphasis added). This statement is at complete variance with the Court's conclusion that Appellant is not an addict. He continues, "as a matter of fact, [Appellant] indicated to us that he could stop using narcotics whenever he wanted to." (emphasis added)

If we assume that the report of the Probation Officer was prepared on the basis of information obtained after Appellant submitted his letter to Judge Gasch then only two conclusions can be drawn: (1) Appellant is suffering from "addiction" and (2) Appellant was using narcotics (otherwise it would be difficult to determine how Appellant could stop).

The reference in the memorandum to Appellant's alleged statement that he could stop using narcotics "whenever he wanted to" is of questionable support for the Court's conclusion that the Probation Officer believed Appellant was not an addict.

It is further submitted that the memorandum of the Probation Officer is deficient in not addressing itself to Appellant's offer to the Court to check the records of the Narcotic Rehabilitation Center. The records of the Center evidence that no attempt was made by the Probation Officer to obtain information.

Finally, the Probation Officer's report suggests that "It should be left up to prison authorities as to when [Appellant] might be placed in a community treatment center." It must be inferred that the Probation Officer felt Appellant had a drug problem or otherwise why should be have considered recourse to the community treatment center.

The policy of the Narcotic Addict Rehabilitation Act, is stated to be that certain persons charged with or convicted or violating Federal criminal laws, who are determined to be addicts addicted to narcotic drugs, and likely to be rehabilitated through treatment, should, in lieu of prosecution or sentencing, be civilly committed for confinement and treatment designed to effect their restoration to health and return to society as useful members. 42 U.S.C. §3401.

It is submitted that Appellant has a substantive right to be committed to treatment under the Act if the

Court finds him to be an addict and an eligible offender. The Act was passed in order to rehabilitate and the courts have a duty to comply with the purpose of the Act where possible. It is not up to "prison authorities" to make this determination. The law provides otherwise.

C. Failure to hold evidentiary hearing constitutes reversible error.

It is submitted that Appellant's motion raised substantial questions and issues of fact regarding his addiction that were not properly evaluated by the Court prior to issuance of the order denying Appellant's motion under Rule 35. It is further submitted that the Court erred in determining the issues before it without affording Appellant notice and without hearing.

In the recent case of United States v. Phillips, 403 F.2d 963 (4th Cir. 1969) the very issue of what constitutes proper procedure in ruling upon a Rule 35 motion was presented on appeal and the Court stated:

> Proceedings under Rule 35 do not require the presence of the defendant unless his testimony is material to the issue raised by his motion Ruiz v. United States, 365 F.2d 500 (3rd Cir. 1966); but if the motion raises a disputed factual issue, then the

> defendant is entitled to notice and to be present at the hearing, United States v. Hayman, 342 U.S. 205, 72 S.Ct. 263, 96L.Ed. 232 (1952). The court may not determine the issue without notice and without hearing at which the defendant is present.

It is submitted that the District Court in the instant case was faced with a disputed factual issue. On its own, the Court could not determine without extrinsic evidence whether or not Appellant was a narcotic addict. Such evidence was lacking.

D. The Court failed to utilize procedures available for determining whether Appellant was a narcotic addict.

It is submitted that the Rehabilitation Act recognized the basic weakness inherent in the sentencing procedure and established a procedure for a specialized examination including psychiatric examination of the fact of addiction and possibilities for rehabilitation. 18 U.S.C. §4252.

In a case in this jurisdiction where the District Court failed to avail itself of the psychiatric examination available to a sentencing judge as provided by law, the Court of Appeals for the District of Columbia held the judge abused his discretion. Leach v. United States, 334 F.2d 945 (1964).

The Court therein stated,

> We do not question the general rule that an appellate court will not ordinarily review sentences that are within the statutory maximum. We hold only that the sentencing judge should use some of the resources which Congress has provided and that he may not arbitrarily ignore the data properly obtained thereby. 334 F.2d at 951

Appellant contends that the within situation is analogus and the District Court's denial of Appellant's motion and failure to order an examination under 18 U.S.C. §4252 constituted an abuse of discretion by the judge.

ARGUMENT IV

APPELLANT IS ENTITLED TO HAVE ORDER VACATED AND CASE REMANDED TO COURT FOR HEARING ON THE ISSUE OF ELIGIBILITY OF APPELLANT FOR TREATMENT.

It is submitted that the record establishes, at the bare minimum, that disputed factual issues as to the status of Appellant as a narcotics addict exists.

As the Court in Phillips, supra correctly observed:

> Appellant at the very least is now entitled to an evidentiary hearing in

> order to determine whether he is an addict eligible for treatment under the Act. If he is an addict eligible for treatment under the Act, the procedures provided for in the Act should be followed unless there is some good reason for not doing so. 403 F.2d 963, at 965.

Similarly in the recent case of United States v. Gaines, No. 23,369, (D.C. Cir. Aug. 27, 1970), decided by this Court involving a similar sale to an undercover policeman the Court remanded for sentencing, saying:

> "There certainly was ample evidence in the record that appellant was a narcotic addict; that fact should have opened the door for investigation of the possible application of the Act. It may well be that consideration was given to appellant's eligibility and that he was determined not to be an 'eligible offender' under one or more of the Act's exclusions. Unless we have some indication of this on the record, however, it is impossible for us to conclude that, for one reason or another, appellant is not eligible for the beneficent treatment made available by Congress to certain addicts. On remand care should be taken to assure that appellant has been considered for everything to which he may be entitled under the Act."

It is submitted that the record herein is similarly devoid of indications that Appellant's eligibility has been justly determined. Accordingly, the Court should remand for a hearing on Appellant's eligibility for treatment under the Narcotic Addict Rehabilitation Act.

SUMMARY OF ARGUMENTS

The function of Rule 35 is to allow correction of an illegal sentence. Since the Narcotic Addict Rehabilitation Act is a mandate from the Congress to commit addicts for treatment, the District Court abused its discretion by severely sentencing Appellant without availing itself of the expert help provided by Congress. The sentence which Appellant is serving is, therefore, illegal and contra to the Rehabilitation Act. The denial of the Appellant's motion without notice to Appellant and without hearing constitutes clear error.

CONCLUSION

For each of the reasons set forth above, the order of the District Court denying the motion for modification of sentence should be vacated and the action remanded to the District Court for hearing on the issue of eligibility of Appellant for treatment or disposition under Title II of the Narcotic Addict Rehabilitation Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been delivered by hand to the Office of the United States Attorney this 25th day of September, 1970.

William D. Outman, II
Counsel for Appellant
(Appointed by this Court)

Reply Brief for Appellant

UNITED STATES COURT OF APPEALS

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SUMMARY OF REPLY

In its brief, the Government raises two principal arguments:

1. The sentencing judge did not abuse his discretion in not sentencing Appellant under the Narcotic Addict Rehabilitation Act, as Appellant was ineligible for commitment under Title II of the Act because:

   A. the "facts and allegations" indicated Appellant was ineligible;

   B. Appellant failed to sustain his burden of proof of eligibility;

2. The Appellant's motion requesting commitment under the Narcotic Addict Rehabilitation Act was properly denied because:

   A. Appellant was ineligible;

   B. Appellant's motion was not cognizable as a motion to contest an illegal sentence under Rule 35 of the Federal Rules of Criminal Procedure.

REPLY ARGUMENT

I.

A. The Government in its brief counters Appellant's argument of abuse of discretion on the part of the sentencing judge by concluding Appellant was entitled to no exercise of discretion since the "facts and allegations" indicated ineligibility of the Appellant for commitment under Title II of the Narcotic Addict Rehabilitation Act (NARA). This argument presupposes only one set of facts and allegations, namely those most favorable to the Government.

A plea of guilty to a sale of narcotics is, at best, a prima facie basis upon which to characterize a defendant as an ineligible offender. The Government, however, asserts that "(a)ppellant was not entitled even to preliminary consideration because he was ineligible as a result of his plea of guilty to two counts of the indictment alleging sale of heroin."1/ (emphasis added). This assertion supports a per se ineligibility doctrine which the Government argues for in this case. The Government's argument when taken to its logical conclusion would preclude any person who enters a plea of guilty, or is convicted of a sale of narcotics as ineligible per se. It is

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1/ Brief for Appellee at 5.

submitted that such portion is clearly against both the statutory language [2] and case law. [3]

The facts and allegations that were before the sentencing judge when viewed on balance[4] do not lend themselves to a conclusion of eligibility. These facts were treated in detail by Appellant in his brief at pages 11 to 14, and it is Appellant's contention that a factual question was raised at sentencing which should have been resolved by proper exercise of discretion by the sentencing judge. The failure of Judge Gasch to do so constitutes error.

The Government cites as support for the position that commitment pursuant to Title II is discretionary with the sentencing judge, United States v. Carroll, No. 23,282

2/ 18 U.S.C. §4251(f)(2)

3/ see United States v. Gaines, No. 23,369 (D.C. Cir. August 27, 1970); United States v. Porter, 277 F. Supp. 655 (D. Minn. 1967).

4/ It is arguable that at this stage the balance should be shifted in favor of the defendant as the court has before it a limited record (assuming as in the instant case a plea of guilty) and any allegations made on defendant's behalf should be taken at face value until evidence can be produced substantiating or discrediting them. In the instant case, for example, Appellant's plea for treatment (Tr. B, p.2.) should have "opened the door" to the court to investigate the applicability of the NARA and the Appellant's eligibility there under. See United States v. Gaines, D.C. Cir. No. 23,369 decided August 27, 1970, slip op. at 7. Had the court taken this step, this appeal would not be before this court as the Appellant would have been accorded the full consideration due him and received the treatment he seeks.

(D.C. Cir. October 20, 1970) and Meyers v. United States, 388 F.2d 307 (9th Cir. 1968), which raise interesting questions when compared with Appellant's case.

In Carroll, supra, the defendant entered a plea of guilty to a count of forgery and at sentencing was advised by the court that he was to be considered for treatment under the NARA. The defendant in Carroll did not seek commitment and, in fact, appealed for review of his commitment. While Carroll clearly indicates that the court can, in a case where the records is limited (as in Appellant's case), entertain an inquiry as to eligibility on its own motion, such holding stands in marked contrast to the instant case in which Appellant was denied proper consideration of his plea for commitment.

In Meyers, supra, the ninth circuit Court of Appeals held that discretion on the subject of commitment under Title II was limited to "eligible offenders" and based its holdings that Meyers was properly denied consideration upon the exclusion for two or more felony convictions.[5/] 18 U.S.C. §4251 (f)(4). The anology the Government seeks to establish between Meyers and Appellant's case is a weak one, for here

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5/ The two felony exclusion rule on which Meyers was based was held unconstitutional by this court in Watson v. United States, No. 21, 186 (D.C. Cir. July 15, 1970)(en banc), and accordingly support for the Government position seems doubtful.

the Government's allegation that Appellant is not an "eligible offender" involves the very determination of fact Appellant asserts was denied him. The Government is again assuming the conclusions of factual questions to which the court has not addressed itself.

B. The Government contends that Appellant failed to sustain his burden of proof as to eligibility for commitment. It cites United States v. Porter, 277 F. Supp. 655 (D. Minn. 1967), as its authority. A full reading of Porter, however, lends support to Appellant's argument in that it also places a burden upon the court to make a finding as to Appellant's eligibility under the NARA.

In Porter the District Court was considering a motion to defer arraignment to permit the defendant to be considered under the NARA. The case represented the first reported opinion interpreting the NARA, and the court set forth guidelines for the determination of eligibility under the Act. The court held that in cases such as Appellant's

> [t]he court thus apparently must make a finding if he is to come under the Act that the defendant's sale of narcotics was for the purpose of raising money to buy narcotics or for the purpose of receiving a bonus in kind to support his addiction. The language is "primary purpose", not sole or only purpose.

> Presumably to make such a finding the court should receive evidence either by affidavit or from witnesses on the stand. It would seem that the burden to establish this qualification as an "eligible offender" should be on the defendant. 277 F. Supp. at 657.

The Porter court placed the burden of proof of eligibility on the defendant, but of more importance here, it placed the burden on the court to make a finding as to the defendant's eligibility in cases such as Appellant's. The court in Porter concluded that

> [i]f the plea be guilty, or if the plea be not guilty and he stands trial and is convicted, then further consideration will be given as to his eligibility under the Narcotic Addict Rehabilitation Act. 277 F. Supp. at 657.

It is Appellant's contention that the record before this court clearly indicates that the court below did not meet its burden, in not making a finding as to Appellant's eligibility. For if we are to hold Appellant to his burden, we must assume the court will sustain its burden also. Failure of the sentencing judge to make a finding constitutes error.

As this court stated in United States v. Gaines, No. 23,369 (D.C. Cir. August 27, 1970), a case involving a similar sale to an undercover policeman:

> [i]t may well be that consideration was given to appellant's eligibility and that he was determined not to be an "eligible offender" under one or more of the Act's exclusions. Unless we have some indication of this on the record, however, it is impossible for us to conclude that, for one reason or another, appellant is not eligible for the beneficent treatment made available by Congress to certain addicts. On remand care should be taken to assure that appellant has been considered for everything to which he may be entitled under the Act. (emphasis added) slip op. at 7,8.

Appellant contends that the within record is similarily devoid of any evidence that Appellant was given consideration as to his eligibility and that no determination was in fact made as to his eligibility thus requiring remand for sentencing.

It is the Government's position that the plea of guilty to the sale of narcotics placed the burden upon the Appellant to reclaim his eligibility by demonstrating that the primary purpose of the sales was to obtain narcotics to support his own addiction and that he was in fact addicted to a narcotic drug. Appellant contends that the record, during the sentencing hearing (Tr. B) raises some, albeit inarticulate, evidence of Appellant's sale of drugs in connection with the support of his own habit. This evidence was not duly considered by the court and constitutes error. cf. Watson v. United States, No. 21,186 (D.C. Cir. July 15,

1970) slip op. at 22.

II.

A. The Government again cites its conclusion that Appellant was ineligible for commitment as authority for its argument that Appellant's motion was properly denied. The error of the Government's reasoning has been set forth above and will not be repeated here. It is important to note here, however, that Appellant in his pro se motion for consideration under the NARA attempted to introduce evidence as to his history of addiction to narcotics. This attempt was defeated by the court's summary denial of his motion and, as Appellant argued in his brief at pages 14 to 21, such denial constitutes error.

B. The Government asserts that Appellant's motion was not cognizable as a motion to correct an illegal sentence under Rule 35, 18 U.S.C. Red. R. Crim. P. 35. As a further premis, however, the Government contends no fault lies with the sentencing judge's failure to consider Appellant for sentencing under the NARA. This argument seems predicated on the assumption that that which is erroneous is not illegal.

Appellant seeks only proper implementation of the sentencing procedure provided by Congress and contends that

it is not the fact that he received incarceration rather than commitment that renders his sentence illegal, but rather, that he was denied full consideration for commitment under Title II as provided by Congress. 18 U.S.C. §2452.

As stated in Appellant's brief, at pages 19 to 21, substantial questions of fact were raised by Appellant's motion, and the court's determination of them without an evidentiary hearing at which Appellant could present evidence constituted error requiring remand. United States v. Phillips, 403 F.2d 963 (4th Cir. 1969).

CONCLUSION

By reason of the foregoing, the order of the District Court denying the motion for modification of sentence should be vacated and the action remanded to the District Court for hearing on the issue of eligibility of Appellant for treatment or disposition under Title II of the Narcotic Addict Rehabilitation Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing reply brief has been delivered by hand to the Office of the United States Attorney this 8th day of December, 1970.

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